MAY 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 965

In Re

DOLCIN CORPORATION and VICTOR VAN DER LINDE,
Petitioners,

—vs.—

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT and FEDERAL TRADE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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THE ALPERT PRESS, INC. — TRIANGLE 5-1058-1059

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners Dolcin Corporation and Victor van der Linde pray that a writ of certiorari issue to review the judgment of conviction for criminal contempt of court made by the Court of Appeals for the District of Columbia Circuit and entered in the above entitled cause on April 8, 1957.

Opinions Below

The opinion of the Court of Appeals, District of Columbia Circuit, Appendix D, has not yet been officially reported. The opinion of the Court of Appeals, July 1, 1954, Appendix B, accompanying the decree entered on said date, upon which the petition to punish was based, is reported in 94 U. S. App. D.C. 247, 219 F. 2d 742 (1954), cert. denied, 348 U. S. 981 (1955). The opinion in support of the order denying a petition for rehearing en banc is reported in 94 U. S. App. D.C. at 257, 219 F. 2d at 751 (1955).

Jurisdiction

The judgments of conviction by the Court of Appeals were entered on April 8, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Are petitioners entitled under due process and in the interest of justice to the privilege of one appellate review from a criminal contempt conviction entered in an original proceeding in the Court of Appeals, District of Columbia?

2. Is not the conviction herein for criminal contempt of Court in substance and effect punishment for violation of a Federal Trade Commission order, as modified and affirmed by the Court of Appeals, with an injunctive provision added in the decree? Should not this extraordinary and unprecedented method of enforcement for an alleged violation be subject to one review?

3. Has not this Court historically used the writ of certiorari to correct a statutory deficiency in the interest of justice?

4. Are petitioners under due process and in the interest of justice entitled to one appellate review when the transcript of record from the Court below shows prima facie if not conclusively that (a) petitioners were at all times ready and eager to comply with the decree and that the failure to take immediate, affirmative steps was caused by (b) an error, if such it be, of competent counsel on a difficult question of procedure and (c) delay for several months occasioned by negotiations between counsel and the compliance division of Federal Trade Commission in a fruitless attempt to reach agreement on the area of permissible claims?

Constitutional Provisions and Statutes Involved

There is no specific statutory provision granting petitioners the privilege of appeal from the conviction herein. Petitioners invoke the due process clause of the fourteenth amendment.

S5(i) of the Federal Trade Commission Act, 15 U. S. C. S45(i) (1952), relied upon by Mr. Markel, counsel for petitioners herein in the Court below, is set forth in Appendix F.

Statement

This is an original proceeding commenced on order to show cause before the Court of Appeals, District of Columbia Circuit. Petitioners (as respondents in the Court below) waived the right to trial by jury and waived the necessity of the taking of oral testimony. The Court found petitioners herein guilty of criminal contempt in failing to obey the terms of a decree, Appendix C, entered July 1, 1954.

Reasons Relied Upon for Allowance of the Writ

I.

Question No. 1:

Petitioners herein have been convicted of criminal contempt of Court in an original proceeding in the Court of Appeals for the District of Columbia Circuit.

We postulate it as axiomatic that any Court of original jurisdiction may be in error and that minimal standards of justice suggest that any litigant be accorded the privilege of one review. This is or should be especially so in criminal contempt, wherein the Court itself determines whether there has been a violation of its own decree. It is true even when the contumacy is in the presence of the Court. *United States* v. *Bollenbach*, 124 F. 2d 458 (1942).

Question No. 2:

The proceeding below appears ostensibly to be a stereotyped proceeding to punish for failure to obey a court order. In reality it is a case of first impression, opening a new and startling phase of Administrative Law, one that has not been passed upon by this Court. Under the decision herein a respondent hardly dare risk appeal from a Federal Trade Commission order because in the process he may subject himself to possible criminal contempt without review in addition to civil penalties.

In the case at bar, the Court of Appeals, upon modification of the order of the Federal Trade Commission added the following injunctive provision (Appendix C):

> "(2) that said order of the Federal Trade Commission as hereby modified be, and it is hereby, ordered enforced and petitioners herein are hereby commanded to obey the terms thereof; * * *."

As the consequence of said appeal therefore, petitioners herein became vulnerable to an additional penalty not theretofore existing, criminal contempt for the alleged violation of a Court order which in substance and effect was an affirmance and modification of the Federal Trade Commission order.

As a final touch we are confronted with conviction without a statutory right of review.

Congress in its wisdom has granted the Federal Trade Commission powers so concentrated as to discourage defense. This has become an era of Administrative Law and consent decrees. Leading American firms have signed consents rather than risk the stigma of "false advertising" or other "unfair trade practices."

Enforcement by criminal contempt from which there is no appeal is a new, unprecedented and oppressive weapon in the field of Administrative Law.

Question No. 3:

Historically, this Court has used the writ of certiorari to correct a statutory deficiency. In *Ex parte Chetwood*, 165 U. S. 443, 462 (1897), the Court said:

> "Judgments in proceedings in contempt are not reviewable here on appeal or error (Hayes v. Fisher, 102 U. S. 121; Re Debs 158 U. S. 573, 159 U. S. 251) but may be reached by certiorari in the absence of any other adequate remedy."

In *In re Watts*, 190 U. S. 1 (1902), petitioners were found guilty of contempt of Court by the District Court of Indiana. As there was no statutory right to appeal, petitioners applied for a writ of habeas corpus. This Court issued the writ and coupled it with a writ of certiorari, and thus brought up the entire record and discharged the petitioners.

In *Bessette* v. *W. B. Conkey Company, supra*, 194 U. S. 324, 335 (1903), the Court said:

> "From these decisions it is apparent that the uniform ruling of this court has been against the right to review the decision of the lower court in contempt proceedings by writ of error, or by appeal, except in cases of purely remedial and interlocutory orders. Yet we have issued certioraries in aid of habeas corpus proceedings and applications for prohibition by which the facts in the contempt case have been brought before us, and then we have passed upon the merits of the decision of the lower court."

In *Toledo Newspaper Co.* v. *U. S.*, 247 U. S. 402 (1917), the Court said:

> "We are of the opinion that a motion to dismiss the writ of error must prevail since it is settled that a conviction for criminal, although summary, contempt is for the purposes of our reviewing power a matter of criminal law and not within our jurisdiction on error * * *. But this does not relieve us from the duty of exerting jurisdiction, as we are of the opinion that the case calls for the exertion of the discretionary power with which we are vested. The writ of certiorari is therefore granted."

Historically, this Court has exercised general "supervisory authority over the administration of criminal justice in the federal court."

See:

Offutt v. *United States*, 348 U. S. 11, 13 (1954);

McNabb v. *United States*, 318 U. S. 332, 341.

II.

Question No. 4:

The petition to punish is premised on the allegation that the order became effective *April 8, 1955* and that petitioners herein were under an absolute duty to take immediate, affirmative steps to comply (p. 9, l. 11).*

Mr. Markel, counsel for these petitioners in the Court below, made two contrary assumptions: [1] that the Court order was not binding until the Federal Trade Commission entered its own order thereon and that his clients would then have sixty days to comply and [2] that in practice the sixty day period is not too strictly enforced so long as negotiations are in progress between counsel and the Compliance Division.

Thus, on May 5, 1955, Mr. Markel wrote to Mr. Morehouse of the Compliance Division:

> "* * * It seems to us there is no order with which to comply until the Commission has 'rendered' its order 'in accordance with the mandate of the court of appeals.' This it has not yet done * * *."

Mr. Markel has always contended that there was no order to obey as the Federal Trade Commission failed to comply with the requirements of S. 5 (i) of the Federal Trade Commission Act, 15 U. S. C. A. 45 (i) (pp. 280-284) (Appendix

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* Numerals in parentheses refer to pages and lines in transcript of record from court below.

F). If he is right, there is no contempt as a matter of law. If he is wrong, at least this can be said: it was the bona fide opinion of competent counsel on a difficult question of procedure and there was no guiding precedent.

Counsel's correspondence with the Compliance Division:

Mr. Morehouse, of the Compliance Division of Federal Trade Commission, in his letters of May 3 and May 9, 1955, made it quite clear he disagreed with Mr. Markel's position (186, 189). The sharp conflict between them on the question of procedure under the Federal Trade Commission Act was never brought home to the client. Instead, in his letter of May 17, 1955 to Mr. Morehouse, Mr. Markel de-emphasized the disputed point of procedure and got right down to the business of compliance. In this letter (p. 190), he said:

> "* * * We are not disposed to labor the point of time of compliance * * *.
>
> "In line with my suggestion when I spoke with you, I enclose herewith certain representative advertising copy for your review and criticism * * *.
>
> "After you have had an opportunity to examine the enclosed material, we should like to have an informal conference with you with a view of resolving the differences, if any, between us."

Thus, on May 17, 1955 (the very day the Court held the contempt began!) Mr. Markel in conformity with usual Federal Trade Commission procedure, submitted "representative advertising copy" asked for "review and criticism" and requested a conference "with a view of resolving the difference, if any, between us."

And on June 7th, the Compliance Division went right along with the suggestion. After setting forth at length, the manner in which the claims violated the decree (p. 192), the Compliance Division said (p. 193, l. 39):

> "* * * You have suggested that you would like to discuss this matter informally prior to the submission of a de-

> tailed report of compliance. After you have had the opportunity to review the points raised herein, I will be glad to confer with you at any time."

Conferences and correspondence continued. Between May 17, 1955 and September 30, 1955 (pp. 190-199), the Compliance Division conferred, wrote, reviewed, criticized and finally rejected the compliance report, during all of which time the clients, unknown to themselves and unknown to their attorney, were in contempt of Court.

We are not criticizing the Compliance Division. On the contrary we maintain the Compliance Division and Mr. Markel were following customary Federal Trade Commission procedure, which allows a respondent a fair and reasonable opportunity to comply.

To hold petitioners were in contempt during this entire period when their counsel and the Compliance Division were discussing the matter of compliance and the area of permissible claims, is error which wants correction.

Counsel's correspondence with his clients, the petitioners herein:

Mr. Dawkins, counsel appointed by the Court to prosecute, argued (p. 301, l. 24):

> "The order of the Court could not have been plainer * * *. It is also plain that respondents understood this order."

The Court went along with this theory and in its opinion stated (Appendix D):

> "The question whether these violations constituted criminal contempt depends upon whether or not it was clear to re ondents that they must comply with our said decree without awaiting further action by the Commission."

We agree with Mr. Dawkins' premise and disagree with the Court's conclusion. Two of the ingredients of contempt

were present; a knowledge of the Court's order and a failure to comply. But nowhere in this record can one find the third requisite—willfulness.

Indeed the letters from Mr. van der Linde to Mr. Markel indicate a keen awareness of the duty to comply, an instinctive feeling that time was of the essence and an undertone of apprehension as he reminded counsel "tempus fugit."

On April 8, he wrote (p. 251, l. 1):

> "As we understand it, the commercials and all other advertising must be revised and in effect by June 7, 1955 in order to comply with the F.T.C. requirements and keep them from hopping on us. Is this correct?"

On May 10, he wrote (p. 251, l. 18):

> "To coin a phrase: tempus fugit. You informed me that the date of compliance * * * is *not* June 4 * * * but will be 90 days after the issue of the modified order by the F.T.C. Are you still of the opinion? * * * for as I told you we do not wish you suddenly to wake-up and tell us that all the commercials have to be changed and that we have just 24 hours to do it!"

As late as October 10, 1955 Mr. Malone of Dolcin Corporation, wrote (p. 254, l. 22):

> "As Victor has told you we are standing by, ready to work night and day to get our new commercials just as soon as we know what we must do to comply with the temporary order * * *."

Excerpts from sixteen of the letters are set forth in the affidavit of Victor van der Linde (pp. 251-254). They prove beyond doubt petitioners herein were ready, willing and eager to comply. Indeed the original correspondence contains just sufficient profanity to show they were written with absolute sincerity and never intended to be self-serving.

The letter of May 17th, 1955 (p. 329).

Counsel in his briefs (p. 239, l. 9) assured the Court with all humility that his clients never intended to violate the order, never intended to affront the dignity of the Court, and if there was a violation, the fault was his. This was not the plea of advocacy, it was personal knowledge. Instead of accepting the representation, the Court picked from the correspondence his letter of May 17, 1955 to the client (p. 329, Appendix D) and held the contempt period began as of that date. The letter on its face, says:

> "* * * (T)here is nothing to settle because the courts have settled the matter for us. Therefore, we are in no position to bargain * * *. The F.T.C. order, as modified by the Court, speaks for itself. There is nothing further to be done, now except comply * * *."

We are handicapped by an incomplete record below, because ironically the May 17, 1955 letter from Mr. Markel was prompted by a letter from the undersigned, Sigmund Eisenstein, dated May 12, 1955, on a subject wholly extraneous to the matter of compliance. On the date of sentence, I was admitted pro hac vice on motion of Mr. Markel. In mitigation, I offered and the Court received the letters appearing (not in chronological order) on pages 333, 334, 335, 336 of the transcript. Briefly, I was concerned with the legal question of the admissibility of a Federal Trade Commission's order in a collateral action or proceeding for the purpose of res judicata or estoppel and I suggested to Mr. Markel that he offer to waive our right to further hearings, which the Court had allowed, as a quid pro quo for a provision that the order should not be used against respondents therein in any collateral action or proceeding.

The May 17th, 1955 letter, on its face, should have warned the Court it could not be relied upon without further inquiry. It speaks of "Any settlement with Federal Trade Commission in the *Dolcin* case", and mentions "* * * my letter to Sig."

The letter runs against the tide of the correspondence. Thus three months later, on August 16, 1955, Mr. Markel is still assuring his client "* * * there is no need for concern * * *" (p. 253, l. 39):

> "However, there is no need for concern at this time because all of this can be taken care of, as, when and if we have gotten together with the Federal Trade Commission on the final principles. Then all of this material will have to be revised to conform to those basic principles."

If the Court will compare Mr. Markel's letter of May 17, 1955 to his client (p. 329) with Markel's letter of the same date to the Compliance Division (p. 190) the inconsistency becomes so patent, the inference is inescapable that the May 17, 1955 letter to the client was on a subject wholly irrelevant to compliance.

The May 17th, 1955 letter to the client on its face does not and cannot as a matter of law alter the picture presented by the record: that petitioners were at all times ready, willing and eager to comply and that their failure to take immediate, affirmative steps on April 8, 1955, was caused by an error, if such it be, of counsel coupled with protracted negotiations between counsel and the Compliance Division seeking an agreement on the area of permissible claims.

Advice of Counsel:

Opposing counsel may argue that reliance upon advice of counsel is no defense to criminal contempt. There are several answers.

(1) Even if this were the sole defense, it was never passed upon by the Court. A defendant is entitled to have the real issue determined and not be told he would have been found guilty anyway.

(2) Petitioners herein were not only relying upon counsel but were lulled into inactivity by the protracted negotiations between counsel and the Compliance Division.

(3) The primary question herein involved is whether petitioners are entitled to one review as of right in the interest of justice. Whether reliance upon counsel coupled with the extended negotiations with the Compliance Division is or is not sufficient will be germane if and when certiorari is allowed.

(4) The general rule (subject to a multitude of exceptions) that advice of counsel is no defense is based upon the presumption that every one is presumed to know the law, which of course is a fiction contrary to fact. To add another presumption that a layman is conclusively presumed to know legal procedure, and that he must take immediate, affirmative action, while his counsel and the Compliance Division are discussing compliance, would be piling fiction upon fiction to the point of absurdity.

Petitioners' error, if any, was an error of omission, not commission. Assuming there was a duty of immediate, affirmative compliance, the breach at most was a negligent failure to comply and not a willful defiance of the order of the Court.

CONCLUSION

The writ should be granted because (a) in the interest of justice petitioners should be afforded one review from a conviction for criminal contempt and (b) the conviction is in substance and effect based upon the alleged violation of an order of the Federal Trade Commission, modified and affirmed by the Court of Appeals, with an injunctive provision added. Whether such power should obtain without privilege of review presents an important question of Federal law which has not been but should be settled by this Court.

Dated, New York, April 29, 1957.

Respectfully submitted,

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Certificate of Service

I, Sigmund Eisenstein, counsel for petitioners Dolcin Corporation and Victor van der Linde, in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 3rd day of May, 1957, I served copies of the foregoing petition for a writ of certiorari on Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission, Washington, 25, D.C., counsel appointed to represent and prosecute on behalf of the Court below, and on Covington & Burling, 701 Union Trust Building, Washington, 5, D.C., counsel of record for George Shimmerlik and Albert T. Wantz, named as respondents in the Court below, by mailing a copy, in a duly addressed envelope, with postage prepaid, to each of them at the respective addresses hereinbefore mentioned, and on The United States of America, by mailing a copy thereof in a duly addressed envelope, with postage prepaid to The Solicitor General, Department of Justice, Washington, 25, D.C.

SIGMUND EISENSTEIN,
Counsel for Petitioners,
Dolcin Corporation and
Victor van der Linde.

APPENDIX A

Filed: January 23, 1952.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 5692

In the Matter of

DOLCIN CORPORATION, and VICTOR VAN DER LINDE, GEORGE SHIMMERLIK, and ALBERT T. WANTZ, individually and as officers of DOLCIN CORPORATION

Initial Decision

By ABNER E. LIPSCOMB, *Hearing Examiner.*

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on August 18, 1949, issued and subsequently served its complaint in this proceeding upon respondents Dolcin Corporation, a corporation, and Victor van der Linde, George Shimmerlik, and Albert T. Wantz, individually and as officers of said corporation, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named hearing examiner theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested; and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

Findings as to the Facts

Paragraph One: Respondent Dolcin Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 683 Fifth Avenue, New York, New York.

Respondents Victor van der Linde, George Shimmerlik, and Albert T. Wantz, individuals, are now and at all times mentioned herein have been directors of said corporate respondent, and respectively, the president, treasurer, and secretary thereof, and with their offices located at the principal place of business thereof; and are now, and at all times mentioned herein have been, in control of the management, policies and operation of the said corporate respondent, including the acts, practices and methods herein found.

Paragraph Two: The respondents are now, and for several years last past have been, engaged in the offering for sale, sale and distribution in commerce, among and between the various States of the United States and in the District of Columbia, of a certain medicinal preparation designated "Dolcin," which is a "drug" within the meaning of the Federal Trade Commission Act, and for which the formula and directions for use are as follows:

Each tablet contains:

Calcium Succinate	2.8 grains
Acetylsalicylic acid	3.7 grains
Plus excipients.	

Directions for Use:

"GENERAL DIRECTIONS

"Read these directions Carefully so that you may learn how you can get Greatest Benefit from DOLCIN.

"In cases of long-standing, where joint-stiffness and pain are acute before starting the DOLCIN Treatment, it is recommended that twelve DOLCIN Tablets be taken daily (3 tablets, 4 times, as explained above) for at least one week, and until the acute symptoms are relieved. Follow this with eight tablets daily for two or three months . . . and then four tablets a day for two months. *It is most important to continue taking DOLCIN for a few months after relief has been obtained,* for it is an established fact that Rheumatic activity usually persists in the body for considerable period after the acute symptoms have subsided.

"Where stiffness of joints is not extreme and muscular pains are not severe . . . or where the case is not one of long standing . . . take eight DOLCIN Tablets daily for the first month (two tablets with a glass of water at each meal and two tablets before retiring for the night). After one month, reduce doses to four tablets daily (one tablet, four times a day) for three months. Then take two tablets daily (one morning, one night) for three months even though all symptoms have disappeared long before.

"It makes no difference whether the DOLCIN at mealtime is taken before, during or after eating . . . But Take Your DOLCIN Regularly. . . . ."

Respondents cause the said product, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in the said product in commerce between and among the various States of the United States and in the District of Columbia. Respondents' volume of business in such commerce is substantial, sales of the drug preparation "Dolcin" in 1948 being in excess of one million dollars.

Paragraph Three: In the course and conduct of their business, respondents, subsequent to March 21, 1938, have disseminated and caused the dissemination, by the United States

mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, of certain advertisements of the drug preparation "Dolcin," for the purpose of inducing, and which were likely to induce, directly or indirectly, its purchase; and have disseminated and caused the dissemination of such advertisements for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said drug preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. Among such advertisements were radio broadcasts disseminated subsequent to October 7, 1948, by various broadcasting stations, and advertisements published in various professional and trade journals having national circulation and in various pamphlets and circulars distributed throughout the United States. Typical of the statements and representations contained in such advertisements are the following:

"HERE IS WHAT YOU SHOULD DO ABOUT
YOUR ARTHRITIS AND RHEUMATISM—

1. *Get a bottle of* DOLCIN tablets and start your DOLCIN treatment at once.

2. *What is DOLCIN?* It is a product which is the result of a new, scientific approach to the treatment of rheumatism and arthritis; it is a development of fundamental biochemical research.

   DOLCIN tablets contain ingredients which medical authorities accept as being correct in the treatment of symptoms of rheumatism and arthritis. DOLCIN is made under strictest laboratory control and is constantly tested for purity of ingredients and for pharmaceutic uniformity.

3. *What does DOLCIN do?* The DOLCIN treatment combines Prompt Relief of pain, Physiological Action, freedom from ill-effects and Low Cost. Thus DOLCIN fills a long-sought objective in the therapy of the Rheumatic State. Rheumatism in its various forms . . . arthritis, myositis, fibrositis and certain forms of bursitis, sciatica and neuritis . . . is, by far, the most prevalent and disabling of all chronic

ailments. Rheumatism is not merely a disorder of joints and muscles, but is generally accompanied by disturbances in internal function (metabolism). It is, therefore, essential that treatment be directed not only toward relief of pain, but also to the disturbances in metabolism which constitute a very important part of the background of the Rheumatic State. DOLCIN therapy not only provides Prompt Relief from pain due to symptoms of rheumatism and arthritis, but DOLCIN contains catalysts which, extensive scientific research has recently proved, play a vital role in the metabolic processes which are disturbed in the Rheumatic and Arthritic State.

4. *I never heard of DOLCIN. How do I know it's good?* Up to a short time ago, DOLCIN was supplied only to hospitals, clinics and to doctors engaged in research and in private practice. Now, however, it is being sold direct to sufferers from rheumatism in all its forms. DOLCIN is becoming more widely-known every day as former victims of arthritic and rheumatic pains pass the good news along.

   DOLCIN has been tested and proved to be efficacious and reliable; it is being used with success in great hospitals, clinics and prescribed by an increasing number of doctors.

5. *All right, but must I get a doctor to prescribe DOLCIN before I use it?* No. You do *not* need a doctor's prescription for you to take the DOLCIN treatment.

   DOLCIN is Non-Toxic. . . . It will *not* hurt the heart or any other organ. A study made in a university famous all over the world confirms extensive earlier clinical proof that DOLCIN is Non-Toxic.

   DOLCIN is designed for Prompt Action. The Lack Of Harmful Effects makes DOLCIN ideal for prolonged administration such as is frequently necessary in chronic and severe cases of rheumatism and arthritis. This freedom from hazard and its effectiveness are Important Advantages of DOLCIN over some medications which are considerably more expensive and which may have harmful effects on the body on prolonged administration.

6. *Is DOLCIN suitable for use by people who are adversely affected by acetyl-salicylic acid (aspirin)?* DOLCIN's ingredients, combined in proper proportions, enhance the good effects of each while, at the same time, they minimize aspirin's sometimes-harmful effects.

   Remember, DOLCIN is Non-Toxic . . . it will *not* harm the heart or any other organ.

7. *Is DOLCIN just another palliative . . . a product for relieving pain for a few hours?* The answer is very definitely that DOLCIN is *not* just a palliative masking pain and discomfort for a few hours. DOLCIN is designed to Relieve Pain Promptly but, also, the DOLCIN treatment is directed to the disturbances in metabolism which are a very important part of the background of the Rheumatic State, and is designed to give prolonged relief from symptoms.

8. *How long will it take to relieve pain and for symptoms of arthritis and rheumatism to disappear?* No two cases respond exactly alike. Generally speaking, the longer the person has suffered from the disease the longer it will take to get results. We know of many cases, where the pain was severe but where the symptoms had only been of few months' standing, in which all pain disappeared in a few hours, other cases take longer.

9. *For how long should I take DOLCIN?* As carefully explained in the directions packed with each bottle, it is most important to continue taking a few DOLCIN tablets every day for a few months after the pain and other symptoms have disappeared; this is to help prevent any recurrence, by giving the body time to get rid of disturbances in internal function which accompany the disease.

10. *How much DOLCIN shall I take?* With every bottle there is a sheet of information and Directions. Study this thoroughly. Remember, because DOLCIN is non-toxic, it is better to take more tablets than necessary rather than fewer . . . and much better to continue the treatment for some time after *all* symptoms have disappeared. You don't want your pains and stiffness back again, do you?

11. *Is DOLCIN of help for children's so-called 'growing-pains'?* Yes. Growing-pains in children are often of rheumatic origin and may precede childhood's scourge, Rheumatic Fever! Any child suffering from growing-pains should be given the DOLCIN treatment at once, under a doctor's supervision.

12. *Should other treatments be used while I am taking the DOLCIN treatment?* Unless prescribed by a physician, no other medication should be, or need be, taken. Leave it to DOLCIN and Nature. Take DOLCIN regularly and give it time to work. Of course, it is natural that a case of arthritis or rheumatism which has taken years to develop cannot be relieved overnight!

13. *My doctor does not know about DOLCIN. How can he learn about it?* If you will send us his name and address, we will gladly send him full scientific data on DOLCIN.

14. *Where can I get DOLCIN?* Ask your druggist. If he has not got it in stock, order DOLCIN direct from us . . . sending your druggist's name and address, please.

15. *What does DOLCIN cost?* The most economical size is the DOLCIN-500 . . . 500 tablets last the average case more than *three months!* . . . Price $9.00.

    DOLCIN-100 . . . 100 tablets for only $2.00

    When you send remittance with your order, we prepay postage and insurance on the shipment.

16. DOLCIN is a tested, honest product . . . non-toxic . . . inexpensive . . . used in hospitals . . . prescribed by doctors. Many, many people are no longer suffering the pain and stiffness of arthritis or rheumatism . . . through taking DOLCIN . . . efficacious, reliable DOLCIN which is the *best friend of arthritics and rheumatics.*"

"Sometimes just a word—spoken at the right time—can alter the whole course of another person's life. Right now, here is such a word for *you*—If you suffer from arthritis or rheumatism—and that word is DOL-

CIN! DOLCIN is a tested new bio-chemical discovery—which many, many people throughout the country report brings swift, effective relief from the agony of arthritic and rheumatic symptoms. People who have suffered from these afflictions *for years*, report they have resumed normal occupations after taking DOLCIN. There's a scientific explanation for this. DOLCIN is more than just a pain killer—in many cases, DOLCIN actually results in prolonged remission of stiffness and discomfort . . . ."

". . . many victims of these diseases have been able to resume normal living by taking DOLCIN. It's used in many hospitals . . . prescribed by many doctors . . . and is designed to bring you sufferers of arthritis, rheumatism, neuritis and sciatica Not temporary relief . . . but prolonged relief . . . ."

"As acetylsalicylic acid in DOLCIN is non-toxic, DOLCIN should be used instead of aspirin."

"DOLCIN is an efficacious, non-toxic and economical preparation for oral administration in relieving symptoms of arthritic and rheumatic disorders. DOLCIN . . . resulting from a new physiological approach in the therapy of arthritic and rheumatic disorders . . . combines the catalytic effect of calcium succinate and acetylsalicylic acid in non-toxic form which may be prescribed for osteoarthritis, infectious arthritis and rheumatoid arthritis as well as for rheumatic fever and various forms of neuritis and sciatica. DOLCIN may be employed as an adjuvant to other therapeutic measures."

". . . Remember the name DOLCIN—D-O-L-C-I-N— for relief of symptoms of arthritis, rheumatism, lumbago and neuritis."

Paragraph Four: Through the above-quoted advertisements, and other similar thereto, respondents have represented, directly or by implication, as follows:

1. That the drug preparation "Dolcin" constitutes an adequate, effective and reliable treatment for, will arrest the progress, correct the underlying causes, cure and prevent the recurrence of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis and all other forms of rheumatism and arthritis and the symptoms and manifestations thereof;

2. That the drug preparation "Dolcin" is inexpensive, in that it is "economical" to purchase and of "low cost";

3. That the drug preparation "Dolcin" constitutes an adequate, effective and reliable treatment for so-called "growing-pains" in children, and that its use will prevent rheumatic fever, which may be preceded by such pains;

4. That the drug preparation "Dolcin" is non-toxic; that it can be used over prolonged periods of time without harmful effects on the body; that aspirin does sometimes produce harmful effects; and that persons adversely affected by aspirin can take "Dolcin" with safety.

Paragraph Five: The terms "arthritis" and "rheumatism" are general terms, sometimes used interchangeably, which may refer to any of many diseases or pathological conditions including, among others, rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, and bursitis, all of which are characterized by one or more of such symptoms or manifestations as pain, stiffness, and inflammatory and destructive changes in the joints and tissues of the body. These pathological conditions are of known as well as unknown origin. Examples of those of unknown origin are rheumatoid arthritis, osteomyelitis and rheumatic fever. Examples of such conditions of known causes are infectious arthritis, such as arthritis of syphilis, arthritis of gonorrhea, and arthritis associated with pneumonia and tubercular infections. In addition there are forms of arthritis, such as gout, which are connected with disturbances of metabolism.

Rheumatic fever is an inflammatory disease of unknown cause, of which the most common manifestations are fever, pain, and swelling and inflammation in the joints, often accompanied by rapid heartbeat, profuse sweating, increase in white corpuscles and other changes in the blood. Rheumatic fever tends to be complicated, and is the chief cause of death from heart disease in children between the ages of 5 and 19. Although "growing-pains" in children may be symptomatic of the early stages of rheumatic fever, they also may be due

to many other and less serious causes, such as playing too hard, and running too much, and do not constitute a disease.

Fibrositis is an irritation or discomfort, a syndrome of pain and stiffness which arises in the fibrous tissues of the body.

The term "myositis" is used generally by doctors and laymen to refer to the condition of muscular rheumatism or fibrositis. It is of varying severity, sometimes mild and localized, sometimes severe and widespread.

The term "neuritis" is a general term referring to an inflammation of the nerves, and denotes many different diseases resulting from various causes, such as infections, pressure on nerves from displaced organs or structures of the body, invasion of the nerve by neoplasm or tumor, intoxication with metals or toxins, and metabolic disturbances such as the form of neuritis occurring in diabetes.

Sciatica is a common form of neuritis felt along the course of the sciatic nerve. It is not a disease, but may occur as a symptom of many different diseases resulting from various causes, such as pressure on the sciatic nerve, a tumor in the spine, infection or inflammation of the sheath of the sciatic nerve, metabolic disturbances caused by toxins resulting from infection, fibrositis or arthritis involving the joints.

Lumbago is a form of fibrositis manifesting itself as a painful condition in the lower part of the back, of varying severity, sometimes so mild as hardly to interfere with a man's business, in other instances so violent as to render him unable to move in bed. Lumbago is associated with stiffness and muscle spasm provoked by attempts to move.

Bursitis is a form of fibrositis having specific reference to inflammation of a bursa, the fibrous sac or membrane surrounding a joint, and may result from invasion of the bursa by various germs, such as streptococcus, mycobacterium, gonococcus, and the tubercular bacillus, and from rheumatic or fibrositic inflammation.

Infectious arthritis is a form of arthritis resulting from invasion of a joint of any one of various germs, such as staphylococcus and streptococcus, which are carried to the joint through the bloodstream from a focus of infection in

the body, caused by an external wound or by various infectious diseases.

Osteoarthritis refers to a disease characterized by degenerative changes in the joints and other tissues and organs of the body. The clinical phenomena associated with osteoarthritis are pain, painful stiffness associated with movement of the joint, enlargement of some joints narrowing of joint spaces, increase in size of joint surfaces, growth of spurs and increase in the extent of margins of the joint.

Rheumatoid arthritis is a chronic, progressive, destructive disease affecting joints and organs of the body, characterized by pain, swelling, stiffness and limitation of motion in joints and deterioration of the patient's general health. This disease is accompanied by pathological changes in the joints, such as thickening of the lining membrane; production of excessive fluid in the bursa in some instances, and absorption of fluid in others; atrophy of muscles, and sometimes destruction of portions of the bone ends, resulting in deformation of the joint. The cause of rheumatoid arthritis is unknown.

Paragraph Six. The various pathological conditions generally referred to as "arthritis" and "rheumatism" progress and develop differently. Likewise, they require different treatment, which will vary not only between different types of such ailments, but between different individuals suffering from the same ailment, and between different stages in the progress thereof. An adequate, effective, or reliable treatment for any kind of "arthritis" or "rheumatism" must, therefore, be predicated upon individual diagnosis, in order to determine whether the patient has arthritis or rheumatism, the particular kind of such ailment present, and whether it arose from a known or an unknown cause. Such a diagnosis may require any or all of the following determinations:

1. History of the patient, including information as to age, sex, marital status, occupation, chronology of the present ailment; family history, such as age and cause of death of parents and relatives; any illnesses from which the patient may have suffered previously, particularly rheumatic fever, scarlet fever and streptococcus infections;

2. Detailed physical examination of every part of the patient's anatomy; and

3. Laboratory examination, such as blood count, serological test for syphilis, urinalysis, and certain other tests as they may seem useful in the individual case, such as X-ray and analysis of fluids in individual joints.

Paragraph Seven: An adequate, effective, or reliable treatment for any of the various types of ailments included in the general terms "arthritis" and "rheumatism" may involve application of various therapeutic measures, including diet; rest or change of occupation; various types of physiotherapy, such as orthopedic or thermal procedures; and medication. Delay of proper diagnosis, with consequent failure to administer appropriate treatment, may result in the evolution of irreversible pathological changes, causing a crippled, useless joint or extremity, especially in those forms of arthritis and rheumatism known to be caused by specific infections. There is no drug, or combination of drugs, regardless of how administered, which will constitute an adequate, effective, or reliable treatment for the various forms of arthritis or rheumatism, nor is there any drug or combination of drugs which can restore to normal the pathological changes which result from arthritic or rheumatic ailments.

Paragraph Eight. The drug preparation "Dolcin" contains 2.8 grains of calcium succinate and 3.7 grains of acetylsalicylic acid, plus excipients of no therapeutic significance.

Calcium succinate, when taken orally, is converted by the liver into sugar, and no significant amount of succinate reaches the bloodstream. In order to be therapeutically operative in the body, succinates must be administered intravenously. When present in sufficient concentration to be operative, the effect of succinates on tissue metabolism is harmful. The quantity of calcium succinate contained in the drug preparation "Dolcin" is entirely too small to achieve or maintain a sufficient concentration in the body to have any effect whatever on the metabolism of the tissues.

Since calcium succinate, administered orally, is therapeutically inoperative, the only active ingredient contained in the drug preparation "Dolcin" is acetylsalicylic acid, commonly known as aspirin, the use and effect of which, as an analgesic and antipyretic, have been known for many years.

The drug preparation "Dolcin" contains acetylsalicylic acid in an amount insufficient to relieve the severe aches, pains and discomforts attendant upon arthritic and rheumatic conditions. The quantity of acetylsalicylic acid therein contained may, however, function as an analgesic and antipyretic to a sufficient extent to afford temporary relief to the minor aches and pains accompanying arthritis and rheumatism.

Paragraph Nine: The drug preparation "Dolcin," however taken, will not constitute an adequate, effective, or reliable treatment for any arthritic or rheumatic condition, including, among others, rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, and bursitis, nor will said preparation arrest the progress, correct the underlying causes, or effect a cure of any of such conditions. The drug preparation "Dolcin," however taken, will not ameliorate the aches, pains and discomforts of any arthritic or rheumatic condition to any extent beyond the temporary relief thereof afforded by its salicylate content as an analgesic and antipyretic. The drug preparation "Dolcin," however taken, will have no significant effect upon severe aches, pains and discomforts accompanying any arthritic or rheumatic condition, and will afford temporary relief of only minor aches, pains and discomforts. With the exception of such temporary relief, the drug preparation "Dolcin" cannot be depended upon to have any effect whatever upon the symptoms accompanying any arthritic or rheumatic condition, including, among others, rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago and bursitis.

The drug preparation "Dolcin," however taken, will not correct disturbances in metabolism nor insure adequate functioning of the metabolic processes of the body.

Paragraph Ten: The drug preparation "Dolcin," however taken, does not constitute an adequate, effective, or reliable treatment for so-called "growing-pains" in children, nor will its use prevent rheumatic fever.

Paragraph Eleven: Since the only therapeutically operative ingredient in the drug preparation "Dolcin" is acetylsalicylic acid, commonly known as aspirin, and since, under certain circumstances, or when taken over prolonged periods of time, aspirin may produce harmful effects upon the body, the drug preparation "Dolcin" may be toxic to the same extent, and cannot be taken over prolonged periods of time without the danger of such harmful effects, nor can such preparation be taken safely by persons adversely affected by aspirin.

Paragraph Twelve: Since the only therapeutically operative ingredient in the drug preparation "Dolcin" is acetylsalicylic acid, commonly known as aspirin, and since the retail selling price, without prescription, of 100 tablets of the drug preparation "Dolcin" is $2.00, whereas that of 100 tablets of a well-known brand of aspirin is 59¢, while many other brands of aspirin sell for less, the drug preparation "Dolcin" is not economical, inexpensive, or of low cost.

Paragraph Thirteen: The record contains no substantial evidence to support the allegation that the administration of the drug preparation "Dolcin" over prolonged periods of time to persons suffering from rheumatic fever may result in serious hemorrhage and in death.

Paragraph Fourteen: Respondents' representations concerning the drug preparation "Dolcin," as hereinbefore found, are false and misleading in material respects; have had the capacity and tendency to mislead and deceive, and have misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were true, and into the purchase of substantial quantities of said drug preparation as a result thereof; and constitute false advertisements within the intent and meaning of the Federal Trade Commission Act.

Conclusion

The acts and practices of respondents, as herein found, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

Order

It Is Ordered that the respondents Dolcin Corporation, a corporation, and Victor van der Linde, George Shimmerlik, and Albert T. Wantz, individually and as officers of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the drug preparation "Dolcin," or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication:

(a) that the taking of said preparation will constitute an adequate, effective or reliable treatment for rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition;

(b) that said preparation will arrest the progress or correct the underlying causes of, or will cure, rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition;

(c) that said preparation will afford any relief of severe aches, pains, and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such condition

in excess of affording temporary relief of minor aches, pains, or fever;

(d) that the taking of said preparation is an adequate, effective, or reliable treatment for so-called "growing-pains" in children, or that its use will prevent rheumatic fever;

(e) that said preparation may safely be taken over prolonged periods of time;

(f) that said preparation may safely be taken by persons adversely affected by aspirin; and

(g) that said preparation is economical, inexpensive, or of low cost, unless and until the retail selling price, without prescription, of such preparation shall, in truth and in fact, be less than the retail selling price, without prescription, of the only active ingredient contained in said preparation, which is acetylsalicylic acid, commonly known as aspirin;

2. Disseminating or causing to be disseminated, any advertisement by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said preparation, which advertisement contains any of the representations prohibited in Paragraph 1 hereof.

ABNER E. LIPSCOMB,
Hearing Examiner.

January 22, 1952.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners: James M. Mead, Chairman, Lowell B. Mason, John Carson, Stephen J. Spingarn, Albert A. Carretta.

Docket No. 5692

In the Matter of

DOLCIN CORPORATION, and VICTOR VAN DER LINDE, GEORGE SHIMMERLIK and ALBERT T. WANTZ, individually and as officers of DOLCIN CORPORATION

Order Denying Appeal From Initial Decision of the Hearing Examiner, Decision of the Commission and Order to File Report of Compliance

This matter came on to be heard by the Commission upon respondents' appeal from the initial decision of the hearing examiner, briefs in support of and in opposition to said appeal and oral argument of counsel. In support of their appeal respondents have set out in their appeal brief extensive exceptions to certain of the findings as to the facts, conclusion and provisions of the order and to certain procedural rulings of the hearing examiner. These exceptions have been fully considered and denied by the Commission in a separate order issued simultaneously herewith.

This matter relates to the truth or falsity of certain claims made by respondents in advertisements of the preparation Dolcin. There is no contest as to the actual advertisements or as to the ingredients of the preparation. The contest is as to the meaning of the advertisements and the effects of using the preparation as directed.

The record shows that respondents claimed in their advertising that, in addition to providing relief from the symptoms of arthritic and rheumatic conditions, Dolcin would attack the underlying causes of the conditions themselves. An ex-

ample is the following excerpt from one of respondents' advertising pamphlets:

> "7. *Is* DOLCIN *just another palliative . . . a product for relieving pain for a few hours?* The answer is very definitely that DOLCIN is *not* just a palliative masking pain and discomfort for a few hours. DOLCIN is designed to Relieve Pain Promptly but, also, the DOLCIN treatment is directed to the disturbances in metabolism which are a very important part of the background of the Rheumatic State, and is designed to give prolonged relief from symptoms."

The greater weight of the evidence is that other than aspirin none of the ingredients in Dolcin have any value in connection with arthritic and rheumatic conditions and that the only value of aspirin taken in this connection is that it provides temporary relief from the less severe pains and fever accompanying these conditions. Respondents admit their preparation will not prevent the underlying causes, cure or arrest the progress of arthritic or rheumatic conditions. However, they do contend that it will relieve stiffness and swelling accompanying such conditions in certain cases in addition to providing pain relief. The greater weight of the evidence is contrary to respondents' contention and fully supports the findings of the hearing examiner in his initial decision.

The record also shows that respondents claimed in their advertising that Dolcin is non-toxic, may be taken safely in large quantities over prolonged periods even by persons adversely affected by aspirin. The greater weight of the evidence shows that the aspirin in Dolcin has exactly the same effect as if taken alone and that certain persons are adversely affected by aspirin and should not take it in large quantities or over a prolonged period. Aspirin is one of the safest analgesics known and is widely prescribed by physicians in large dosages for temporary relief of pain and fever in arthritic and rheumatic conditions. Serious results from such excessive use are rare. However, less serious but undesirable effects such as headache, nausea, vomiting will occur in per-

sons unable to tolerate aspirin. Respondents' representations to the contrary are false and deceptive as found by the hearing examiner in his initial decision.

For these reasons as well as those set out in its ruling on respondents' exceptions, the Commission is of the opinion that all of the findings as to the facts contained in the initial decision are supportable by reliable, substantial, and probative evidence of record; that the conclusion contained therein is correct; and that the order to cease and desist therein is proper upon this record and is required to provide proper relief from respondents' illegal practices; and

The Commission, therefore, being of the opinion that respondents' appeal from the hearing examiner's initial decision is of no merit and that said initial decision is appropriate in all respects to dispose of this proceeding:

It Is Ordered that the appeal of respondents from the initial decision of the hearing examiner be, and it hereby is, denied.

It Is Further Ordered that the initial decision of the hearing examiner shall on the 2nd day of December, 1952 become the decision of the Commission.

It Is Further Ordered that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in said initial decision, a copy of which is attached hereto.

By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. DANIEL,
Secretary.

SEAL

ISSUED: December 2, 1952.

APPENDIX B

(Federal Trade Commission Docket 5692)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11700

DOLCIN CORPORATION, and VICTOR VAN DER LINDE, GEORGE SHIMMERLIK, and ALBERT T. WANTZ, Individually and as Officers of Dolcin Corporation, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

On petition for review of order of the
Federal Trade Commission
Decided July 1, 1954

Mr. Michael F. Markel, with whom *Mr. Wayne K. Hill* was on the brief, for petitioners.

Mr. John W. Carter, Jr., Attorney, Federal Trade Commission, of the bar of the Supreme Court of Virginia, *pro hac vice,* by special leave of Court, with whom *Messrs. Robert B. Dawkins,* Assistant General Counsel, Federal Trade Commission, and *Donovan Divet,* Special Attorney, Federal Trade Commission, were on the brief, for respondent.

Before Bazelon, Fahy and Washington, Circuit Judges.

WASHINGTON, *Circuit Judge:* This is a review of a cease and desist order of the Federal Trade Commission. Petitioners, the Dolcin Corporation and certain of its officers, are engaged in the manufacture of a drug—"Dolcin"—designed primarily to relieve the symptoms of arthritis and rheumatism. Each "Dolcin" tablet contains 2.8 grains of calcium succinate and 3.7 grains of acetylsalicylic acid (aspirin). Petitioners have repeatedly made far-reaching

claims as to the product in their advertisements. The Federal Trade Commission, as a result, issued a complaint in August of 1949. After extensive hearings the trial examiner found that petitioners' advertising representations were in large part incorrect. The Commission affirmed the trial examiner's findings and on the basis of them issued a cease and desist order. In essence this order forbids petitioners from representing that Dolcin (1) is inexpensive; (2) may safely be taken over prolonged periods of time; (3) may safely be taken by persons who are adversely affected by aspirin; (4) will have any effect upon arthritic or rheumatic conditions beyond affording temporary relief of minor aches, pains or fever.[1]

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[1] The Commission's order seeks to restrain petitioners from advertising as to Dolcin—

"(a) that the taking of said preparation will constitute an adequate, effective or reliable treatment for rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition;

"(b) that said preparation will arrest the progress or correct the underlying causes of or will cure, rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition;

"(c) that said preparation will afford any relief of severe aches, pains, and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording temporary relief of minor aches, pains, or fever;

"(d) that the taking of said preparation is an adequate, effective, or reliable treatment for so-called 'growing-pains' in children, or that its use will prevent rheumatic fever;

"(e) that said preparation may safely be taken over prolonged periods of time;

"(f) that said preparation may safely be taken by persons adversely affected by aspirin; and

"(g) that said preparation is economical, inexpensive, or of low cost, unless and until the retail selling price, without prescription, of such preparation shall, in truth and in fact, be less than the retail selling price, without prescription, of the only active ingredient contained in said preparation, which is acetylsalicylic acid, commonly known as aspirin."

I.

Petitioners attack the Commission's order on several grounds. The first of these is that they were denied a fair hearing, in that Dolcin was made the subject of a test case to govern the status of all distributors of similar drugs: that the Commission denied petitioners the privilege of revising their advertising by stipulation; and that on the basis of the evidence taken in petitioners' case the Commission entered a cease and desist order against another distributor before it had decided the instant case, thus prejudging the matters in controversy.

The record before us does not establish the claimed unfairness. There is no showing that prior to the issuance of the Commission's complaint the petitioners had purged their advertising of the criticized claims; on the contrary, petitioners contest to this day the restrictions which the Commission then and now seeks to impose. And in any event abandonment of challenged practices does not automatically bar the issuance of a complaint. *Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321 (7th Cir.), cert. denied, 323 U.S. 730 (1944). The record does show another case involving "Sural," a similar drug put out by the Norlon Corporation, was the subject of a stipulation between the latter company and the Commission, whereby the medical evidence in the instant case would form part of the record in that case.[2] After the hearing in the present case was completed, petitioners asked for oral argument. The Norlon Company did not. The same trial examiner sat in both cases. He issued an Initial Decision in *Norlon* in January 1952 and a similar Initial Decision in *Dolcin* in the following month. In May 1952 the Commission issued a final order in *Norlon;* in June it heard argument in *Dolcin,* and issued its final order against these petitioners in December. The orders in the two cases were similar.

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[2] It was not, of course, the whole record: the nature of Norlon's advertising would have to be established.

It may be that petitioners were in some degree prejudiced by the course the Commission took: their oral argument was delivered under the handicap of a fresh precedent rendered on the same medical evidence. But administrative agencies are under congressional mandate to "proceed with reasonable dispatch to conclude any matter presented."[3] and on the facts before us we see no abuse of discretion on the Commission's part in deciding *Norlon* as soon as it was ready for decision. Petitioners made no timely motion to have the decision in *Norlon* postponed until after the argument in *Dolcin*, nor did they move for any definite form of relief after *Norlon* came down. The occurrences here do not establish bias or disqualification on the part of the Commission; certainly nothing is shown sufficient to invalidate the hearing and the subsequent decision. *Cf. Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700 (1948); *United States* v. *Morgan*, 313 U.S. 409, 420-21 (1941).

II.

Petitioners also complain of errors by the trial examiner in the conduct of the hearing. One grievance is that they attempted to cross-examine some of the Commission's expert medical witnesses concerning statements made by other experts writing in various medical publications. The trial examiner would not allow the questions. Implicit in his rulings was the theory that medical publications were hearsay which could be used upon cross-examination only if the witness had relied upon them in direct examination. Petitioners contend this was an erroneous restriction on the scope of cross-examination and that it warrants reversal. They rely primarily on *Reilly* v. *Pinkus*, 338 U.S. 269 (1949).

In that case the petitioner (Pinkus) had sent representations through the mail about "Dr. Phillips' Kelp-I-Dine Reducing Plan." The Postmaster General, after a hearing,

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[3] Administrative Procedure Act § 6(a), 5 U.S.C. § 1005(a) (1952).

found these representations to be fraudulent and issued an order restricting petitioner's use of the mails. At the hearing doctors had testified as experts for the Post Office Department as to the efficacy of Kelp-I-Dine. They based their opinions at least in part, upon their reading of medical textbooks and publications. Petitioner sought to cross-examine these doctors concerning statements in other medical books. The questions were not allowed. The Supreme Court, as a result, held that the Postmaster General's order should not be enforced by the courts, saying:

> "It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books." 338 U.S. at 275.

Reilly v. *Pinkus*, we think, stands for the general proposition that an expert witness who bases an opinion to a significant degree upon his reading may be cross-examined as to that opinion by reference to other reputable works in his field.[4] It is not necessary for the witness to have relied in his testimony upon the particular authority the cross-examiner seeks to use.[5] And we do not think that the Court

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[4] The Court does not say how the authority of those works is to be determined. It seems clear from the facts given in the opinion that it is unnecessary for the witness himself to recognize the authority of the work [but see Lawrence v. Nutter, 203 F. 2d 540 (4th Cir. 1953)] or even to have read it [but see Shaw v. Duncan, 194 F. 2d 779 (10th Cir. 1952)]. We think the authority of the work is for the presiding officer to decide. And we think he should have a broad discretion in determining what—and how much—evidence may be presented on that question.

[5] It has long been accepted that an expert witness may be cross-examined as to an authority he relied upon for his testimony. Garfield Memorial Hospital v. Marshall, 92 U.S. App. D.C. 234, 204 F. 2d 721 (1953); see WIGMORE, EVIDENCE § 1700(b) (3d ed. 1940). But before Reilly v. Pinkus the Circuits were split on whether or not works on which the witness had not relied could be used in cross-examination. Allowed: Victor American Fuel Co. v. Tomljanovich, 232 Fed. 662 (1st Cir. 1916), *cert. denied*, 242 U.S. 643 (1916). Not allowed: E. I. duPont

limited its ruling to cases involving fraud.[6] The *Reilly* case also holds that the trial examiner has broad discretion to determine the extent of the cross-examination on written authorities.[7] He probably has, in some cases, discretion to determine whether there should be any such cross-examination at all. But it is error to exclude such questions by blanket rule, without more.

The examiner thus erred in the instant case. The question remains whether reversal is warranted. In deciding *Reilly* v. *Pinkus*, the Supreme Court could hardly have intended to bring about reversal of every administrative hearing in which the trial examiner improperly excluded some questions on cross-examination—or in which some other error was made as to the admission or exclusion of evidence. The Court said:

> "The power to refuse enforcement of orders for error in regard to evidence should be sparingly exercised. A large amount of discretion in the conduct of a hearing is necessarily reposed in an administrative agency. And what we have said is not to be taken as removing this discretion or as a compulsory opening of the gates for floods of medical volumes, even where shown to be authoritative." 338 U.S. at 276.

The decision of the Postmaster General was upset in that case with good reason. The works on which the cross-examiner relied apparently were directly relevant to the central issue of the case and were in direct conflict with the

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de Nemours & Co. v. White, 8 F. 2d 5 (3d Cir. 1925); Western Union Telegraph Co. v. Ammann, 296 Fed. 453 (3d Cir. 1924). *Compare* Yarn v. Ft. Dodge D.M. & S.R. Co., 31 F. 2d 717 (8th Cir.), *cert. denied*, 280 U.S. 568 (1929), *with* Woelfle v. Conn. Mut. Life Ins. Co., 103 F. 2d 417 (8th Cir. 1939). And see Mutual Benefit Health & Acc. Ass'n v. Francis, 148 F. 2d 590 (8th Cir. 1945).

[6] See Lawrence v. Nutter, 203 F. 2d 540 (4th Cir. 1953). But see Carter Products v. Federal Trade Commission, 201 F. 2d 446 (9th Cir.), judgment vacated on other grounds, 346 U.S. 327 (1953).

[7] Reilly v. Pinkus, 338 U.S. 269, 276 (1949). See also Lawrence v. Nutter, 203 F. 2d 540, 543 (4th Cir. 1953).

Post Office Department's position. As a result they were of great importance to the petitioner. Had the witness been confronted with them and had the conflict been demonstrated to the trier of fact there might well have been a different result. This is especially so as fraud—the good or bad faith of the petitioner—was at issue in the case. The question was not whether petitioner's representations were correct, but whether or not he reasonably considered them correct. See 338 U.S. at 276. A single authority in agreement with petitioner might well be decisive on that issue—although it might be far from proving that the representations were correct. Moreover, on the basis of the hearings an order of extreme severity— restricting petitioner's use of the mails— was imposed. It was with these factors present that the Supreme Court allowed the order of the Postmaster General to be overturned. We think it did so because under the circumstances of the case the restriction of cross-examination denied the petitioner substantial justice.

That was not the case here. Fraud was not at issue. A cease and desist order of the Federal Trade Commission "does not approach the severity of a mail fraud order." *Reilly* v. *Pinkus,* 338 U.S. at 277. And in the instances complained of here the works which petitioners sought to use touched only indirectly on the central issue. An example appears in the cross-examination of Dr. Rosenberg. Petitioners' counsel sought to read a statement in Comroe's *Arthritis* to the witness for his comment. The witness said that the book was a good one, though he would not vouch for everything that was in it, and that the chapter referred to by the cross-examiner was written by a specialist of very fine reputation. Petitioners' counsel said, "I am offering to cross-examine this witness on the question of the importance of the alleviation of pain in the field of arthritis and rheumatism." Objection was sustained. From petitioners' brief, it appears that the statement sought to be read to the witness was the following:

> "Salicylates are the best of the analgesics in rheumatoid arthritis; aspirin (acetyl salicylic acid) and sodium salicylate are the most commonly used preparations."

This statement seems to us of no significant help to petitioners' case. Most witnesses readily agreed that aspirin was best for relieving the less severe pains of arthritis and rheumatism. Dr. Rosenberg had merely refused to assent to the statement that aspirin was the drug of choice as given by petitioners' counsel—unqualified and divorced from the circumstances of any individual case. And he had said that giving relief from pain was important and helpful in the treatment of rheumatism and arthritis. The value to petitioners' case of a reading of the proposition in Comroe's *Arthritis* was, therefore, slight. The other instances were similar in this respect, and were further weakened by the fact that there was no showing that the works were authoritative or were so regarded by the witness. On the whole record, we cannot say that the trial examiner's rulings on these matters denied petitioners substantial justice, or warrant reversal of the order.[8]

Petitioners allege similar error on the part of the trial examiner when he declined to receive in evidence certain scientific writings. These articles and treatises were offered by petitioners through experts described as "eminently qualified to be fully cross-examined on the science of the field, including the literature to the date of the offer." (Br. 52) We assume the writings to be authoritative, and the witnesses to be qualified.

When used to prove the truth of their contents scientific writings are clearly hearsay and are rejected as judicial evidence in all but a few jurisdictions. See *United States* v. *One Device*, 160 F. 2d 194, 198-99 (10th Cir. 1947); 6 Wigmore, *Evidence* § 1690 (3d ed. 1940). Nevertheless, cogent arguments can be made in favor of their use. Such material,

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[8] *Compare* FED. R. CIV. P. 61: "No error in either the admission or the exclusion of evidence . . . is ground for . . . disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. . . ."

as Wigmore has pointed out,[9] is at least as reliable as the ordinary expert's testimony from the stand. It usually is characterized by precise formulation and documentation. Moreover, the ordinary expert when testifying most often relies in whole or in part upon the written works of other experts. The chief objection to the use of scientific articles—and the standard reason for the hearsay rule in general—is that the utterer of the statement (the author) is not subject to cross-examination. Yet that objection may be largely obviated by requiring the introduction of the articles through experts in the field who will, themselves, be subject to cross-examination.

We think authoritative scientific writings can—and should—be freely used by administrative agencies.[10] Such agencies are not bound by the ordinary rules of evidence. Congress has said that "any oral or documentary evidence may be received . . . ." Administrative Procedure Act, § 7(c), 5 U.S.C. § 1006(c) (1952); see also *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 44 (1904); *Bene & Sons* v. *Federal Trade Commission*, 299 Fed. 468, 471 (2d Cir. 1924). Furthermore, the rationale of *Reilly* v. *Pinkus* points toward use of scientific texts in adversary proceedings. But, in line with our interpretation of that case on the issue of cross-examination, we think that an agency's decision should not be reversed by reason of the exclusion of scientific writings unless substantial justice so requires. We would hesitate in most cases to say that a rule almost universal in the courts would, in an administrative proceeding, deny the parties substantial justice. And here the writings in question were not vital to petitioners' case. Lengthy articles were offered on subjects of marginal significance, which had been covered (or could have been covered) by the testimony of witnesses. The record, already of great length, would have been encum-

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[9] 6 WIGMORE, EVIDENCE § 1690 (3d ed. 1940).

[10] Of course, the trial examiner must have a broad discretion to prevent a deluge of repetitive material or material of comparatively small value.

bered with a vast amount of miscellaneous learning—some dating back to 1878. We do not think the trial examiner's rulings denied petitioners substantial justice.

An additional point is urged by petitioners; that the trial examiner prematurely closed the hearing, over their objection. We need not enter into a detailed recital of the facts. The first hearing began on March 6, 1950; the last was held on November 13, 1951. During this time, petitioners had asked and received delays totaling many months. Our reading of the record satisfies us that petitioners had ample opportunity to put in their case, and that the trial examiner did not abuse his discretion by closing the hearing when he did.

III.

Petitioners earnestly contend that the provisions of the Commission's order[11] are not adequately supported by the evidence.

At the hearing Dolcin offered considerable testimony in support of its advertising. There was conflicting evidence on many points. But we do not think the Commission resolved the conflict in an unreasonable manner. Subject to what is about to be said concerning paragraph 1(c) of the order, we think the findings and order were supported, on the record as a whole, by substantial evidence. They must, therefore, be upheld, unless they are defective in other respects. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951).

Paragraph 1(c) of the order directs petitioners to cease and desist representing "that said preparation will afford any relief of severe aches, pains, and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording temporary relief of minor aches, pains, or fever."

Petitioners urge that this provision is unduly restrictive, in that their product does give a measure of relief that is

[11] See note 1, *supra*.

more than temporary, and in cases of pain that are more than minor. The record contains much to support this position, though it also supports the Commission's finding that Dolcin "will have no significant effect upon severe aches, pains and discomforts" of the conditions involved. The Commission says that petitioners, in complying with the order as written, "are not required to use the word 'temporary.' They can comply by merely avoiding the use of such phrases as 'prolonged relief.'" (Br. 39) Although the Commission does not say so, like reasoning would seem to permit petitioners to avoid using the word "minor." This leaves an undesirable ambiguity. As we recently said: "It seems to us to be better procedure, in that it will eliminate confusion and possible misunderstanding, to modify the order in accordance with a clear statement of its intended meaning, rather than to construe an admittedly ambiguous phrase." *Hamilton Mfg. Co* v. *Federal Trade Commission*, 90 U.S. App. D.C. 169, 194 F. 2d 346 (1952).[12]

We think that there will be less ambiguity, and closer conformity to the Commission's findings, if paragraph 1(c) of the present order is modified to read as follows:

> "that said preparation will afford significant relief of severe aches, pains and discomforts or permanent relief of any aches, pains and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording relief of aches, pains or fever within the foregoing limits;"

Petitioners ask that the Commission's order be amended to preserve the right, under Section 15(a) of the Federal

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[12] In Rhodes Pharmacal Co. v. Federal Trade Commission, 208 F. 2d 382 (1953), the Seventh Circuit had before it an order similiar to the present, issued with respect to a drug called "Imdrin," of much the same formula as Dolcin. The court modified the order, but in a manner which we do not consider would be justified on the record in the present case.

Trade Commission Act,[13] to distribute advertisements to members of the medical profession on a different basis than to the general public. We think this modification should not be made. The provisions of the statute are "necessarily implicit in every order issued under the authority of the Act, just as if the order set them out *in extenso*." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 at 476 (1952). Advertising to the medical profession which meets the standards set by Section 15(a) thus remains protected by it, without need of modifying the order.

IV.

Prior to the hearing in this court petitioners moved for leave to adduce additional evidence pursuant to Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c) (1952).[14] We denied the motion at that time "without prejudice to a renewal at the hearing of this case on the merits." That motion has now been renewed. Petitioners allege that they have available the results of a carefully controlled clinical test of the therapeutic value of the Dolcin formula. This test, they say, was conducted by a well qualified research organization. They also allege that upon request over 300 doctors have used the Dolcin formula and have filled out questionnaires on the results. These questionnaires are now available. We think the terms of Section 5(c) have been fulfilled. The evidence is clearly material. Since there is no indication that it was available at the time of the hearing (or could or should have been made so available), petitioners had reasonable ground for failing to adduce it at that time. That being so, the disposition of the motion is within our discretion. *Cf. National Labor Rela-*

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[13] 15 U.S.C. § 55(a) (1952).

[14] ". . . If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. . . ."

tions Board v. *Indiana & Michigan Elec. Co.*, 318 U.S. 9 (1943); *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100 (1942). We think it should be granted. At the time of the original hearing there had been no well controlled tests or large scale surveys run on the efficacy of the Dolcin formula. The instant investigations, therefore, may perhaps be regarded as significant by the Commission. We think petitioners should have an opportunity to present testimony on them to the Commission—though we do not wish to indicate any view as to the weight (if any) which the Commission should attach to them. And nothing in this opinion, of course, should be read as precluding the Commission from hearing any further evidence in the case—beyond that just discussed—which it may wish to consider.

On the other hand, this case has been in contest for a long time. The Federal Trade Commission issued a complaint against Dolcin on August 18, 1949. The hearings, with many delays, lasted until November of 1951. It is now nearing five years since the case arose. Ae we have said, we think the order of the Commission—as here modified—is amply supported by the present record. The public interest in the rapid suppression of misleading medical advertisements is obvious. We see no need to delay finalization of the modified order throughout the taking of the additional evidence. Section 5(c) provides that the court may order additional evidence to be taken "upon such terms and conditions as to the court may seem proper." We think a proper condition here is that the order of the Commission—as here modified—become final as though this were a simple affirmance. 15 U.S.C. § 45(g) (1952). If after further hearing the Commission desires to amend its order appropriate steps may be taken looking toward an alteration of our decree, or other proper action on our part.

The order of the Commission will accordingly be

Affirmed, as modified, and the enforcement thereof, as modified, will be ordered; additional evidence shall be taken in accordance with this opinion.

APPENDIX C

(United States Court of Appeals
for the
District of Columbia Circuit
Filed Jul. 1, 1954
/s/ JOSEPH W. STEWART,
Clerk)

UNITED STATES COURT OE APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,700

April Term, 1954.

DOLCIN CORPORATION, and VICTOR VAN DER LINDE, GEORGE SHIMMERLIK, and ALBERT T. WANTZ, Individually and as Officers of Dolcin Corporation, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

On Petition for Review of Order of the Federal Trade Commission.

Before: Bazelon, Fahy, and Washington, Circuit Judges.

Decree

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is Ordered by this Court that paragraph 1(c) of the order of the Federal Trade

Commission on review in this cause be, and the same is hereby, modified so as to read as follows:

> "that said preparation will afford significant relief of severe aches, pains and discomforts or permanent relief of any aches, pains and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording relief of aches, pains or fever within the foregoing limits."

It is Further Ordered and Decreed by this Court:

(1) that said order of the Federal Trade Commission as hereby modified be, and it is hereby, affirmed;

(2) that said order of the Federal Trade Commission as hereby modified be, and it is hereby, ordered enforced and the petitioners herein are hereby commanded to obey the terms thereof; and

(3) that additional evidence shall be taken by the Federal Trade Commission in this case in accordance with the opinion of this Court.

Dated: July 1, 1954.

Per Curiam.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 648

In re: Dolcin Corporation and Victor van der Linde, George Shimmerlik and Albert T. Wantz, individually and as officers of Dolcin Corporation

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On Order to Show Cause in Criminal Contempt

Decided December 18, 1956

Mr. Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission, appointed by this Court to prosecute the respondents for criminal contempt.

Mr. Michael F. Markel, with whom *Mr. Wayne K. Hill* was on the brief, for respondents.

Before BAZELON, FAHY and WASHINGTON, *Circuit Judges.*

PER CURIAM: The facts essential to a decision in these contempt proceedings are not in dispute.[1] The advertisements referred to in our Findings[2] entered this day violated the decree of this Court of July 1, 1954. The question whether these violations constituted criminal contempt depends upon whether or not it was clear to re-

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[1] The Statement of Proceedings, Finding of Guilt and Findings of Fact, and Order are appended hereto and may be considered part of this opinion.

[2] The texts of these advertisements appear in the Appendix to the original of this opinion.

spondents that they must comply with our said decree without awaiting further action by the Commission. We think the terms of our decree did make it clear that they were to do so, especially when read in the light of our opinion of July 1, 1954,[3] and the opinion of Judges Edgerton, Prettyman, Bazelon, Fahy and Washington of February 3, 1955, in support of the order denying respondents' petition for rehearing *en banc*.[4] In the latter opinion it is made explicit that respondents were to comply with our decree from and after its date, that is, that they were required, notwithstanding an interim between our decision and possible subsequent modification of its order by the Commission, to comply immediately with the terms of the order of the Commission, as modified, affirmed and enforced by our decree.[5] If, however, clarity in this regard might not have carried over to respondents prior to May 17, 1955, any possible failure on their part to understand the situation was removed by the letter of the corporation's counsel to its president of that date, which stated in part:

> "* * * * [T]here is nothing to settle because the courts have settled the matter for us. Therefore, we are in no position to bargain.
>
> "The F.T.C. order, as modified by the Court, speaks for itself. There is nothing further to be done now except comply with its provisions until such time when it is amended by the Commission. * * *"

The charges of which we find the respondents guilty embrace conduct subsequent to this letter.

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[3] Dolcin Corp. v. Federal Trade Commission, 94 U.S. App. D.C. 247, 219 F. 2d 742 (1954), *cert. denied*, 348 U.S. 981 (1955).

[4] *Ibid.*, 94 U.S. App. D.C. at 257, 219 F. 2d at 751 (1955).

[5] We do not read § 5(i) of the Federal Trade Commission Act, 15 U.S.C. § 45(i) (1952), to the contrary, or as a limitation on our authority in the premises.

STATEMENT OF PROCEEDINGS

The above-entitled matter came on for hearing on November 8, 1956, on an order to show cause why respondent Dolcin Corporation and respondents Victor van der Linde, George Shimmerlik and Albert T. Wantz, individually and as officers of Dolcin Corporation, should not be adjudged in criminal contempt. Before the Court, in addition to the aforesaid order to show cause, were (1) the petition of the Federal Trade Commission for prosecution of respondents for criminal contempt, (2) respondents' return to the order to show cause, including a motion to dismiss and expunge as to respondents Shimmerlik and Wantz, (3) the brief in support of the petition filed by counsel appointed by the Court to prosecute the respondents for criminal contempt, (4) respondents' brief in reply and in support of motion to dismiss the petition and to discharge the order to show cause, and (5) the answer to respondents' motion to dismiss filed by counsel appointed by the Court to prosecute the respondents for criminal contempt. The petition for prosecution and the order to show cause were served by the United States Marshal upon the individual respondents personally, and upon respondent Dolcin Corporation by serving Victor van der Linde, vice-president of said corporation. The individual respondents each waived, in writing, his right to be present at any hearing in these proceedings. Respondents by their counsel, in open Court, waived trial by jury and declined to offer oral testimony. There was no request that the Court find the facts specially pursuant to Rule 23(c), Federal Rules of Criminal Procedure.

The parties submitted to the Court the matter of the criminal contempt on the foregoing pleadings, on the affidavits and exhibits attached thereto, and on oral argument of counsel.[6]

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[6] Permission was granted to respondents during oral argument, without objection, to submit to the Court radio commercial advertising copy broadcast since October 8, 1956. Said copy was received by the Court on November 13, 1956. Said copy bears only on respondents' compliance subsequent to the date of any charges in this contempt proceeding, and therefore has not been considered on the question of guilt or innocence.

FINDINGS OF GUILT

AND

FINDINGS OF FACT

The Court having considered the same now hereby finds beyond a reasonable doubt that each of the respondents is guilty of criminal contempt of this Court, in that each of them wilfully disseminated, or caused to be disseminated, in commerce,[7] advertisements in the form of radio commercials which contained representations violative of the decree of this Court against respondents [petitioners there] in *Dolcin Corporation, et al.* v. *Federal Trade Commission*, No. 11,700, entered on July 1, 1954, and made effective April 8, 1955, with notice and knowledge that said representations violated the aforementioned decree, as set forth more fully in paragraphs XIV(1)(f) and XIV(2) of the petition of the Federal Trade Commission for prosecution of respondents for criminal contempt, filed June 14, 1956. Said commercials were broadcast by radio at the times and places indicated below:

Radio Station	*Place of Broadcast*	*Dates of Broadcast* [1955]
Exhibit A—Dolcin Script No. 92-60		
WDAS	Philadelphia, Pennsylvania	September 16
Exhibit B—Dolcin Script No. 100-60		
WFIL	Philadelphia, Pennsylvania	September 12, 13, 24, 26 October 8

[7] As "commerce" is defined in the Federal Trade Commission Act § 4, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 44 (1952).

Station	Place of Broadcast	Dates of Broadcast [1955]
it C—Dolcin Script No. 101-60		
P	Washington, D. C.	May 24, 25, 31
AL	Washington, D. C.	September 12, 15, 20, 22, 27, 30 October 5, 8, 12, 17
DC	Silver Spring, Maryland	September 12, 15, 19, 22, 26, 29 October 6, 13, 19
L	Philadelphia, Pennsylvania	September 14, 27 October 10
it D—Dolcin Script No. 102-60		
P	Washington, D. C.	May 25, 31
AL	Washington, D. C.	September 12, 15, 20, 23, 27, 30 October 5, 10, 13, 17
DC	Silver Spring, Maryland	September 12, 15, 19, 22, 26, 29 October 3, 6, 10, 13
L	Philadelphia, Pennsylvania	September 15, 28 October 13
it E—Dolcin Script No. 103-60		
L	Philadelphia, Pennsylvania	September 16, 30 October 14
it F—Dolcin Script No. 104-60		
P	Washington, D. C.	May 25, 26 June 1
AL	Washington, D. C.	September 13, 16, 20, 23, 28 October 3, 6, 10, 13, 18
DC	Silver Spring, Maryland	September 13, 16, 20, 23, 27, 30 October 4, 7, 11, 14, 18
L	Philadelphia, Pennsylvania	September 17 October 4, 11
it G—Dolcin Script No. 105-60		
L	Philadelphia, Pennsylvania	September 19 October 12
it H—Dolcin Script No. 106-60		
P	Washington, D. C.	May 20, 27 June 1, 2
AL	Washington, D. C.	September 13, 16, 21, 26, 29 October 3, 6, 11, 14, 18
DC	Silver Spring, Maryland	September 13, 17, 20, 24, 27 October 1, 4, 8, 11, 15
L	Philadelphia, Pennsylvania	September 20, 29 October 5, 15

Radio Station	*Place of Broadcast*	*Dates of Broadcast* [1955]
Exhibit I—Dolcin Script No. 107-60		
WFIL	Philadelphia, Pennsylvania	September 21 October 1, 17
Exhibit J—Dolcin Script No. 108-60		
WTOP	Washington, D. C.	May 23, 28 June 3
WMAL	Washington, D. C.	September 14, 19, 22, 26, 29 October 4, 7, 11, 14, 19
WWDC	Silver Spring, Maryland	September 14, 21, 28 October 5, 12, 19
WFIL	Philadelphia, Pennsylvania	September 22 October 3, 6, 18
Exhibit K—Dolcin Script No. 109-60		
WTOP	Washington, D. C.	May 23, 30 June 1, 4
WMAL	Washington, D. C.	September 14, 19, 22, 27, 29 October 4, 7, 12, 15, 19
WWDC	Silver Spring, Maryland	September 14, 21, 28 October 3, 5, 10, 12, 17, 19
WFIL	Philadelphia, Pennsylvania	September 23 October 7, 19
Exhibit L—Dolcin Script No. 114-60		
WMAL	Washington, D. C.	October 20, 24, 25, 27, 28, 31 November 2, 3, 5, 8, 9, 11, 14, 15, 17, 18, 22, 23, 24, 28, 29 December 1, 2, 5, 7, 8, 10
WWDC	Silver Spring, Maryland	October 20, 23, 25, 26, 28, 31 November 2, 3, 5, 8, 9, 10, 13, 15, 16, 18, 21, 23, 24, 26, 29, 30 December 2, 5, 6, 8, 9
Exhibit M—Dolcin Script No. 115-60		
WMAL	Washington, D. C.	October 21, 24, 25, 27, 28 November 1, 2, 3, 7, 8, 10, 1[illegible], 14, 16, 17, 19, 22, 23, 25, 28, 29 December 1, 2, 6, 7, 8
WWDC	Silver Spring, Maryland	October 21, 24, 25, 27, 28 November 1, 2, 3, 6, 8, 9, 11, 14, 15, 1[illegible] 18, 22, 23, 24, 27, 29, 30 December 2, 5, 7, 8, 10

Order

It is ordered by the Court that:

1. Insofar as the petition for prosecution charges contemptuous conduct prior to May 17, 1955, it is hereby dismissed;

2. Respondents' motion to dismiss the petition and to discharge the order to show cause is hereby denied;

3. Respondents' motion to dismiss the proceeding as to respondents George Shimmerlik and Albert T. Wantz, and to expunge their names from this proceeding, is hereby denied;

4. Each of the respondents is hereby adjudged guilty of criminal contempt of this Court;

5. Respondents Victor van der Linde, George Shimmerlik, and Albert T. Wantz, in person, and respondent Dolcin Corporation, by its above-named officers, appear before this Court on the 14th day of January, 1957, at ten o'clock A.M., for a hearing to determine the nature and extent of the punishment to be imposed;

6. A certified copy of the foregoing Opinion, Statement of Proceedings, Finding of Guilt and Findings of Fact, and of this Order be served upon the respondents, and upon each of them, by the United States Marshal for the District in which they may be found and that due return of such service be made.

David L. Bazelon,
Circuit Judge,

Charles Fahy,
Circuit Judge,

George T. Washington,
Circuit Judge.

Appendix

Exhibit A—Dolcin Script No. 92-60

Are you on a bed of torture *lashed* by stabbing pains of arthritis or rheumatism? Agony in every movement you make? *Stop and think* . . . is it *necessary* to suffer this way? The answer—DEFINITELY NO! Thousands of men and women know the secret. It's DOLCIN . . . DOLCIN tablets. Grateful users tell of pains *fully relieved* . . . swellings usually *reduced* . . . joints *free* and *easy* again . . . and, so often,—*complete* and *long-lasting* relief from such attacks. What a *world* of difference in *their* lives . . . thanks to DOLCIN tablets. You, too, may escape the crucifying punishment of arthritis, rheumatism, sciatica, bursitis or lumbago. Yes . . . try DOLCIN . . . the formula prescribed by so many doctors . . . used regularly by famous hospitals and clinics. Call your druggist . . . ask him to send you a bottle of DOLCIN . . . D-O-L-C-I-N. Start right now to come out from under the shadow of arthritic or rheumatic pain—with *effective, fast-acting, long-lasting, low-cost* DOLCIN.

Exhibit B—Dolcin Script No. 100-60

Are arthritic, rheumatic or muscular pains making *you* feel miserable? If so . . . you should start taking DOLCIN . . . D-O-L-C-I-N . . . DOLCIN tablets today. What a record DOLCIN has for fast, long-lasting relief from such pains! A record *backed by proof*. *Proof* based on clinical studies of the DOLCIN formula in America, Canada, England and other countries. Yes . . . it has been proved *beyond all doubt* that DOLCIN tablets . . . taken as directed . . . usually bring *fast relief* from pain of arthritis, rheumatism, muscular aches, neuritis and bursitis. No wonder safe, non-toxic, non-habit-forming DOLCIN is the world's *best-known*, most *widely-used* product in its field. More than *one billion, four hundred million* DOLCIN tablets have been used. Go to your

druggist *today*. Ask him for DOLCIN . . . D-O-L-C-I-N. He'll tell you there's nothing else so much in demand . . . so low-in-cost as DOLCIN . . . for relief of pains and discomforts of arthritis and rheumatism.

EXHIBIT C—Dolcin Script No. 101-60

If *you* suffer from arthritis or rheumatism, you've probably noticed the recent flood of sensational advertising by new products coming on the market. *Before* you are *taken-in* by the preposterous, *unproved claims* for many untested preparations, consider these four facts: FACT ONE—the *best-known, best-proved, most widely-used* formula for *direct, fast, safe, effective* relief of such pains is the DOLCIN formula. FACT TWO—*hundreds of thousands* of victims of arthritis, rheumatism, muscular pains, sciatica, neuritis and lumbago report DOLCIN tablets gave them speedy, long-lasting relief from such pains. FACT THREE—the DOLCIN formula has been hailed by *hundreds upon hundreds of doctors* in America, Canada and England as *vastly* superior. FACT FOUR—DOLCIN tablets are *absolutely safe* . . . non-toxic . . . harmless to the heart or any other organ—when taken as directed. Go to your druggist *today*. Ask him for DOLCIN . . . D-O-L-C-I-N . . . for relief of pains and discomforts of arthritis and rheumatism.

EXHIBIT D—Dolcin Script No. 102-60

Before you try *any* medication for pains of arthritis or rheumatism GET THE FACTS. Find out if it *really* works. Is it *safe?* Is it *time-tested?* In the case of DOLCIN the answer to *all* these questions is an unqualified *YES!* Your *doctor* . . . your *druggist* . . . will tell you DOLCIN *gets results* because its action is thorough and *different*. DOLCIN tablets are *safe* . . . and act *differently* from old-fashioned *aspirin*. DOLCIN is *harmless* to the *heart* or *any other organ* when taken as directed. DOLCIN has stood the test of time for *eight long years*. *Don't* be fooled by phony claims of

untested imitations! Rely on *original,* genuine, effective DOLCIN. *Proved* by thousands upon thousands of men and women . . . proved by *clinical tests* . . . proved by *doctors* . . . proved by *hundreds of hospitals* . . . proved by *years* of use. Yes . . . for relief of pains and discomforts of arthritis, rheumatism, muscular aches, neuritis, sciatica or lumbago, try DOLCIN . . . D-O-L--C-I-N. So effective . . . so safe . . . so easy-to-take. THAT'S DOLCIN.

EXHIBIT E—Dolcin Script No. 103-60

If *you* are a victim of arthritis or rheumatism pains *listen* to to this vitally-important bulletin from the makers of DOLCIN . . . the world's best-known product for relief of such pains. WE QUOTE: "Arthritic sufferers are being bombarded today by sensational advertising of untested, unproved so-called "miracle drugs". No claim seems too wild, too fishy, too phony. DOLCIN answers these claims with *facts* . . . facts we challenge any imitator *anywhere* to match. IT'S A FACT that the DOLCIN formula has been judged *by many doctors . . . as superior to all other medications used by them.* IT'S A FACT that American druggists report DOLCIN out-sells all other preparations in its field. IT'S A *FACT* that exhaustive clinical studies prove DOLCIN tablets . . . taken as directed . . . produced improvement in 95 cases out of 100." END OF QUOTE. Friends . . . be guided by facts. If you suffer from pains of arthritis, rheumatism, muscular aches, neuritis, sciatica or bursitis . . . *try* DOLCIN. *Effective, safe, non-toxic, fast-acting* DOLCIN.

EXHIBIT F—Dolcin Script No. 104-60

Are *you* suffering from pains of arthritis or rheumatism? And . . . are *you wondering* whether to take a chance on one of the new, sensationally-advertised products which promises overnight relief? THEN HEAR THIS: the best-known formula *in all the world for fast, safe, long-lasting* relief

from such pains is the *one-and-only, time-tested, medically-proved DOLCIN* formula. Here are *facts* about safe, effective, reliable DOLCIN tablets: First . . . more than *one billion, four hundred million* DOLCIN tablets have been used by men and women throughout the world. Second . . . the DOLCIN formula has been judged *superior* . . . by many doctors. Third . . . exhaustive tests in clinics . . . *prove conclusively* the many outstanding advantages of the DOLCIN formula over the so-called "wonder-drugs" and old-fashioned aspirin as well. So, friends . . . if you suffer from arthritis, rheumatism, muscular aches, sciatica, neuritis or bursitis, don't take chances with untested, unproved preparations—try the tried and true. TRY DOLCIN . . . the world's favorite . . . because DOLCIN GETS RESULTS.

EXHIBIT G—Dolcin Script No. 105-60

Do *you* like to have your *pocket picked? Of course* you don't! But that's what happens to sufferers from athritis or rheumatism foolish enough to fall for the bogus advertising-claims of certain new, so-called remedies now coming on the market. Before you throw away your money on such unproved preparations, GET THE FACTS. The world's best-known product for relief of pains of arthritis and rheumatism . . . DOLCIN . . . gives you *proof*. *Proof* of the DOLCIN formula's efficacy, safety, reliability and superiority. *Proof* based on years of successful use . . . on studies made by doctors and clinics in America, Canada, England and other countries. Yes . . . it has been proved *beyond all doubt* that DOLCIN tablets . . . taken as directed . . . usually bring *fast relief* from pain—even in severe cases. More than *one billion, four hundred million* DOLCIN tablets have been used to bring *blessed, merciful* relief to those who suffer from pains and discomforts of arthritis, rheumatism, muscular aches or bursitis. Try effective, safe, non-toxic, fast-acting, low-cost DOLCIN . . . D-O-L-C-I-N . . . DOLCIN.

EXHIBIT H—Dolcin Script No. 106-60

Arthritis . . . rheumatism! If *you're* suffering tortures from one of these twin cripplers . . . LISTEN . . . *You need pay so little for the finest medication money can buy!* That's DOLCIN . . . D-O-L-C-I-N . . . DOLCIN tablets—one of the *best-known, best-proved, most widely-used* formulas for *direct, fast, safe, effective relief* of such pains. Those are FACTS . . . NOT CLAIMS. Facts based on *proof. Proof* based on *years* of successful use . . . on *studies* made by *doctors* and *clinics* in America, Canada, England and other countries. *Proof* of results reported by *thousands upon thousands* of users. There's good reason for these *proved* results: DOLCIN'S action is *thorough* and *different* . . . *different* from old-fashioned aspirin . . . *different* from DOLCIN'S host of imitators . . . *different* from salves, rubs and liniments that just cover up your pain for a few minutes. If you want *real* results . . . if you want *real* relief from pains and discomforts of arthritis, rheumatism, muscular pains, sciatica or neuritis . . . try DOLCIN. That's D-O-L-C-I-N . . . DOLCIN tablets.

EXHIBIT I—Dolcin Script No. 107-60

Here is a message from the makers of DOLCIN of *great importance* to you if you suffer from pains and discomforts of arthritis or rheumatism. Here's what it says: "Many high-priced, doubtful anti-rheumatic products coming on the market . . . misleading public through sensational advertising . . . using outrageous, unsupported claims. Advise those considering purchase to get facts before they throw their money away. All our modest DOLCIN claims based on *eight solid years of proof, performance and fair-dealing.* Clinical studies and tests by hundreds of doctors here and abroad prove fully and conclusively DOLCIN formula *safer, more effective, prompter-acting, longer-lasting—superior on every count* to *any* other preparation in its field. We challenge all others to match this record." End of message. There you

have it, friends! If you suffer from pains of arthritis, rheumatism, muscular aches, sciatica, neuritis or lumbago . . . *be guided by facts* . . . don't be fooled by phony claims . . . *try* DOLCIN. Effective, safe, non-toxic, fast-acting, low-cost DOLCIN tablets.

EXHIBIT J—Dolcin Script No. 108-60

Are *you* the victim of a *tormenting* attack of arthritis, rheumatism or muscular pains? Do you know that thousands upon thousands of men and women report *prompt, long-lasting* relief from such attacks . . . thanks to DOLCIN . . . D-O-L-C-I-N . . . DOLCIN tablets? Yes . . . the DOLCIN formula is the *best-known, best-proved, most widely-used* formula of its kind in all the world for *fast, effective, long-lasting relief* from such pains. Your druggist will tell you DOLCIN *gets results* because its action is thorough and *different. Different* from old-fashioned aspirin! *Different* from untested, unproved imitators! *Safe, non-toxic, non-habit-forming!* Harmless to *heart, stomach or any other organ*—when taken as directed. Go to your druggist today! He'll tell you there's *nothing* else *in the world* . . . for relief of pains and discomforts of arthritis, rheumatism, muscular pains, neuritis or sciatica . . . more effective . . . faster . . . safer . . . so low-in-cost as DOLCIN . . . DOLCIN tablets.

EXHIBIT K—Dolcin Script No. 109-60

Are stabbing pains of arthritis or rheumatism taking all the joy out of life? Wondering what to do to get *real* relief? THEN LISTEN: Thousands upon thousands of men and women report fast, long-lasting, merciful relief by taking DOLCIN . . . D-O-L-C-I-N . . . DOLCIN tablets. Yes . . . when DOLCIN tablets were taken as directed . . . pains usually vanished quickly . . . sore, tender swellings in many cases got *better* and *better* . . . finger, wrist, knee and other joints *loosened up. And then, . . . long-lasting relief from agony...* These are *facts*, not claims. Facts about the DOL-

CIN formula—*proved beyond the shadow of a doubt* by clinical studies here and abroad. Facts which prove . . . fully and conclusively . . . that DOLCIN formula is *safer, more effective, prompter-acting, longer-lasting . . . superior on every count* to *any* other preparation in its field. If you suffer from arthritis, rheumatism, muscular pains, sciatica or lumbago . . . IF YOU WANT RESULTS . . . try DOLCIN . . . safe, non-toxic, non-habit-forming DOLCIN.

EXHIBIT L—Dolcin Script No. 114-60

Arthritis . . . rheumatism! If *you're* suffering from pains of these conditions . . . LISTEN . . . *you need pay so little for the finest medication money can buy!* That's DOLCIN . . . D-O-L-C-I-N . . . DOLCIN tablets—one of the *best-known, best-proved, most widely-used* formulas for *direct, fast, effective relief* of such pains. Those are FACTS . . . NOT CLAIMS. Facts based on *proof! Proof* based on *years* of successful use . . . on *studies* made by *doctors* and *clinics* in America, Canada, England and other countries. *Proof* of results reported by *thousands upon thousands* of users. There's good reason for these proved results: DOLCIN'S action is *thorough* and *different . . . different* from DOLCIN'S host of imitators . . . *different* from salves, rubs and liniments that just mask your pain. If you want *real* results . . . if you want *real* relief from pains of arthritis, rheumatism, muscular pains, sciatica or neuritis . . . try DOLCIN. That's D-O-L-C-I-N . . . DOLCIN tablets. In case of severe or persisting pains see your doctor.

EXHIBIT M—Dolcin Script No. 115-60

Are pains of arthritis or rheumatism taking all the joy out of life? Wondering what to do to get *real* relief. THEN LISTEN! Thousands upon thousands of men and women report fast, merciful relief from pains by taking DOLCIN . . . D-O-L-C-I-N . . . DOLCIN tablets. Yes . . . when DOLCIN tablets were taken as directed . . . pains usually vanished

quickly. These are *facts*, not claims. Facts about the DOLCIN formula—*proved beyond the shadow of a doubt* by clinical studies here and abroad. Facts which prove . . . fully and conclusively . . . that DOLCIN formula is effective, *prompt-acting, and . . . superior on every count* to *any* other preparation in its field. If you suffer from arthritis, rheumatism, muscular pains, sciatica or lumbago . . . IF YOU WANT RESULTS . . . try DOLCIN . . . effective, fast-acting, non-habit-forming DOLCIN. In case of severe or persisting pains see your doctor.

A true Copy,

Test:

(Seal)

JOSEPH W. STEWART
Clerk of the United States Court of Appeals
for the District of Columbia Circuit

APPENDIX E

The judgment, dated April 8, 1957, imposing a fine of $15,000.00 on Dolcin Corporation upon conviction of criminal contempt of Court, is set forth in full on Page 324 of the certified transcript of record of the Court below and the judgment, dated April 8, 1957, imposing a fine of $2,500.00 on Victor van der Linde upon conviction of criminal contempt of Court is set forth in full on Page 323 of said certified transcript of record of the Court below.

APPENDIX F

(1) If the order of the Commission is modified or set aside by the circuit court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the circuit court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 965

DOLCIN CORPORATION AND VICTOR VAN DER LINDE, PETITIONERS

v.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 49–55) has not yet been reported. The opinion rendered by that court when it entered the judgment which petitioners were found to have violated (Pet. 34–46) is reported in 219 F. 2d 742, certiorari denied, 348 U. S. 981, and its opinion denying rehearing *en banc* is reported in 219 F. 2d 751.

JURISDICTION

The judgments of conviction (Pet. 63) were entered on April 8, 1957, and the petition for a writ of cer-

tiorari was filed on May 3, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The court below entered judgments convicting petitioners of criminal contempt by reason of their wilful violation of a judgment of that court which had affirmed and enforced an order of the Federal Trade Commission.

The question presented is whether the fact that such judgments are reviewable only by this Court constitutes in itself a ground for granting certiorari.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45, provides in part as follows:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals * * *. * * * To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari * * *.
>
> * * * * *

(g) An order of the Commission to cease and desist shall become final—

* * * * *

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; * * *.

STATEMENT

In August 1949 the Commission filed a complaint charging that petitioner Dolcin Corporation and three of its officers (including petitioner van der Linde) were violating Section 5 of the Federal Trade Commission Act (Pet. 15). In December 1952, after extensive hearings, the Commission found that the respondents in that proceeding were violating Section 5 and it entered a cease and desist order (Pet. 29–30, 33).

In July 1954 the court below affirmed this order, with a slight modification of one of its paragraphs (Pet. 43–46). The court also held that it would grant petitioner's application for leave to present newly discovered evidence to the Commission but that it would not "delay finalization of the modified order throughout the taking of the additional evidence" (Pet. 46). The court noted that the case had started nearly five years earlier, and said: "The public interest in the rapid suppression of misleading medical advertisements is obvious" (*ibid.*). The court accordingly ruled that, in exercising its power to order the taking of additional evidence "upon such terms and conditions as to the court may seem proper", it would, in granting leave to adduce additional evidence, impose

the condition that the Commission's order "become final as though this were a simple affirmance" (*ibid.*).

The judgment which the court entered provided that the Commission's order as modified by the court "be, and it is hereby, ordered enforced and the petitioners herein are hereby commanded to obey the terms thereof" (Pet. 48).

A majority of the full membership of the court below denied a petition for rehearing *en banc*. In an opinion accompanying the order, the court said that, while immediate enforcement of its judgment might cause petitioners some loss of profits, continuance of advertising which is misleading "may cause many sick persons to postpone—perhaps irretrievably—more effective treatment, and waste their hopes and funds on petitioners' product." 219 F. 2d at 752. The court concluded that "the balance of equities seems clear: the policy of the statute is served by enforcement of the order" during the period of reconsideration (*ibid.*). On April 4, 1955, this Court denied a petition for writ of certiorari (348 U. S. 981).

In April 1956 the Commission requested the court below to permit it to file a petition for prosecution of petitioners for criminal contempt of the court's judgment of July 1, 1954, and in July 1956 the court directed the filing of such a petition and served on petitioners a rule to show cause. The court subsequently heard the case on the pleadings and affidavits, together with oral argument of counsel (Pet. 51). The court found "beyond a reasonable doubt" that

each petitioner had wilfully and knowingly disseminated in interstate commerce advertisements, in the form of "radio commercials," which made representations violative of the court's judgment (Pet. 52). More than 275 such broadcasts, made within the period May 20, 1955, to December 10, 1955, are set forth in the findings (Pet. 52–54).

The court's opinion dealt with the only question about which there could be any doubt—whether it was clear to petitioners that they had to comply with the court's judgment without further action by the Commission. The court stated that the terms of its judgment "make it clear that they were to do so," and that its opinion on the requested rehearing *en banc* made the requirement of immediate compliance "explicit" (Pet. 50). The court added that any possible misunderstanding of the situation by petitioners was removed by a letter of May 17, 1955, from counsel for petitioner Dolcin to its president, and that the court based its findings of guilt upon conduct subsequent to this letter (*ibid.*).[1]

The judgments entered imposed a fine of $15,000 on the corporate petitioner and a fine of $2,500 on the individual petitioner (Pet. 63).

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[1] The letter stated in pertinent part (Pet. 50):

"* * * (T)here is nothing to settle because the courts have settled the matter for us. Therefore, we are in no position to bargain.

"The F. T. C. order, as modified by the Court, speaks for itself. There is nothing further to be done now except comply with its provisions until such time when it is amended by the Commission. * * *"

ARGUMENT

The petition (Pet. 8–9) concedes that petitioners' broadcasts violated the court's judgment and that petitioners had knowledge of the judgment. That the violation was flagrant is shown by even a cursory comparison of the prohibitions of the Commission's order as affirmed by the court (Pet. 29–30, 33, 47–48) with Dolcin's broadcasts, *e. g.*, the first of those set forth in the Appendix to the court's findings (Pet. 56). The petition likewise does not contend that the court below erroneously determined any question of law. At most, the petition suggests error in a factual determination—the wilfullness of petitioners' violation. This is plainly not a question warranting the grant of certiorari.

Petitioners' contention, variously stated, is that certiorari should be granted because the judgment below is reviewable only by this Court. This represents a plea that, when a court of appeals renders the initial judicial decision, an application for certiorari should be converted into appeal as of right. To accept this view would mean that the innumerable administrative decisions (*e. g.*, those of the National Labor Relations Board, Federal Communications Commission, and similar agencies) on which courts of appeals initially pass should be reviewed as of right in this Court. Nor is it a significant distinction that the proceeding below was one to punish for contempt. This Court's rules and practice make clear that a substantial question—plainly lacking here—is a prerequisite to the grant of certiorari regardless of the nature of the proceeding.

In view of petitioners' frequent reference to "negotiations" with the Compliance Division of the Commission with respect to compliance with the court's judgment (Pet. 2, 6–8, 11–12), we think it appropriate to state that the Compliance Division never treated compliance as a subject for negotiation. The Division's position and attitude are shown by the following from its letters to petitioners' counsel (Appendix to Petitioners' Answer to Request to File a Petition for Prosecution):

A letter of May 9, 1955, states:

> As you know, the decree of the Court of Appeals for the District of Columbia entered on April 8, 1955, which commands compliance with the Commission's order, as modified by that court, is in full force and effect. Therefore, violations of the court's decree will subject respondents to penalties for contempt.
>
> It is the intention of the Commission to determine respondents' present compliance with the decree of the court of appeals and their intentions with respect thereto. If respondents do not see fit to furnish a voluntary report of compliance at this time, a determination as to their compliance with the court's decree will be made by means of other available procedures.

A letter of June 7, 1955, states:

> The advertising material submitted with your letter of May 17 has been examined and in my opinion contains many claims violative of the decree filed by the Court of Appeals for the District of Columbia on April 8, 1955.

A letter of September 30, 1955, states:

> The respondents' report submitted by you on August 10, 1955, to show the manner of their compliance with the Court's decree in the above-captioned matter is rejected. The report clearly shows violation of the decree of the Court rather than compliance with it.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

CHARLES H. WESTON,
Attorney.

EARL W. KINTER,
General Counsel,

ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission.

MAY 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957